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No. 94-0154

In The

# Supreme Court of the United States

October Term, 1994

MEMBERS OF THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, CENTRAL VALLEY REGION, IN THEIR OFFICIAL CAPACITY, AND EAST BAY MUNICIPAL UTILITY DISTRICT, A CALIFORNIA MUNICIPAL UTITLITY DISTRICT,

*Petitioners,*

v.

COMMITTEE TO SAVE THE MOKELUMNE RIVER,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

The petition presents two questions. First, whether the Court of Appeals for the Ninth Circuit was correct in holding that the Penn Mine Pollution Abatement Facility, which discharges polluted leachate into the Camanche Reservoir and the Mokelumne River, is a point source subject to the permit requirements of Section 301(a) of the Federal Water Pollution Control Act (the "Clean Water Act" or "Act"), 33 U.S.C. § 1311(a). Second, whether it properly concluded that both petitioners, as joint owners and operators of the Facility, are liable under the Act for those discharges in the absence of a permit.

## PARTIES TO THE PROCEEDING

Respondent accepts petitioners' identification of the parties. Respondent is a not-for-profit California corporation and has no parent company, subsidiaries or affiliates. This statement is provided pursuant to Supreme Court Rule 29.1.

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## RESPONDENT'S BRIEF IN OPPOSITION

Respondent Committee to Save the Mokelumne River ("Committee") respectfully requests that this Court deny the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The Committee accepts petitioners' identification of the opinions below.

## STATEMENT OF JURISDICTION

The Committee accepts petitioners' statement of jurisdiction.

## STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth in the Appendix to the Petition for a Writ of Certiorari ("Petitioners' Appendix") at A63-A87, and in the Appendix to the Respondent's Opposition ("Respondent's Appendix") at A1-A3.

## STATEMENT OF THE CASE

The Committee brought a citizen suit for declaratory and prospective injunctive relief against petitioners East

Bay Municipal Utility District ("EBMUD" or the "District") and the members of the Regional Water Quality Control Board – Central Valley Region ("Regional Board") for their unlawful discharge of pollutants from the Penn Mine Pollution Abatement Facility ("Facility") into the Camanche Reservoir and Mokelumne River in violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a). The Facility was designed to collect, store, evaporate, and, from time to time, discharge acid mine drainage from property owned by EBMUD and the now-defunct New Penn Mines, Inc. into the river.

The petition for a writ of certiorari seeks review of the opinion of the court of appeals affirming that the petitioners' discharges from the point source they own and operate require the same permit necessary under the Clean Water Act for other commercial or private facilities.

### A. History of the Site

The Mokelumne River flows through the heart of California, beginning its journey as a Sierra Nevada mountain stream in the Mokelumne Wilderness, winding through the foothills and down into the Central Valley before joining the San Joaquin River. The Mokelumne River supports an abundance of wildlife and riparian vegetation and is the major water supply for residents of Contra Costa and Alameda Counties, as well as the community at Camanche South Shore, which draws its water supply directly from the river downstream from the Facility. The river is home to a myriad of fish species, aquatic life and wildlife, and several fisheries. It supports various other recreational, municipal, domestic and agricultural

water supply uses, which have been compromised by the discharge of tons of toxic heavy metals into the river during normal rainfall years from the Facility that the petitioners designed, built, own and control.

Petitioner EBMUD is a public utility formed in 1923 under California's Municipal Utility District Act, Cal. Pub. Util. Code § 11531, *et seq.* Since its formation, EBMUD has gained control of the lower Mokelumne River through the construction and operation of dams and reservoirs to provide water for approximately 1.2 million residents of Alameda and Contra Costa Counties. Its aquaducts bring water more than 90 miles across the San Joaquin Valley from Pardee Reservoir, EBMUD's principal water source. Camanche Dam, located ten miles downstream from Pardee Dam on the Mokelumne, facilitates the District's use of Pardee Dam by providing flood control and the storage capacity required to supply other water rights holders. Camanche Dam allows the District to exercise its water rights and contracts for up to 325,000,000 gallons of water daily from Pardee Reservoir. EBMUD's water system budget for the 1993-94 fiscal year is more than $270,000,000.

The Facility is located in the Sierra foothills east of Stockton, California, on the eastern bank of Camanche Reservoir. In the early 1960's, EBMUD acquired a portion of the Penn Mine property through condemnation from New Penn Mines, Inc., in the course of building the Camanche Dam and Reservoir. By acquiring the property along the waterline of Camanche Reservoir, EBMUD is free to vary the water levels behind Camanche Dam to suit its storage needs.

At the time of acquisition, the property was the site of an abandoned copper and zinc mine. It was and still is covered with exposed mine tailings, reactive waste rock and excavated ores. When exposed to air and water, the tailings, waste rock and ores form "acid mine drainage." Acid mine drainage can, in turn, dissolve or "leach" metals such as aluminum, cadmium, arsenic, lead, copper, and zinc. In the concentrations historically found in the river adjacent to the site, those metals are toxic to many forms of aquatic life. Once dissolved, those heavy metals can also precipitate out of the leachate to form toxic sediment.

When EBMUD suddenly released a large quantity of water from Pardee Dam in 1977, the flow washed acid mine drainage and metals-laden sediment that had been deposited downstream from Penn Mine into the Camanche Reservoir and beyond. The toxic, chocolate-brown flow killed tens of thousands of fish.

The 1977 release was not the first instance of water quality problems attributable to acid mine drainage from the site. In the course of prior unsuccessful enforcement efforts against the mine owner, the Regional Board required New Penn Mines, Inc. to obtain a National Pollution Discharge Elimination System permit.

Similarly, in response to the 1977 disaster, the Regional Board issued a cleanup and abatement order pursuant to California Water Code § 13304(a), directing EBMUD to remedy the polluting conditions at the site.[1]

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[1] Section 13304(a) requires persons to take remedial action if they have discharged waste into California waters, deposited

The order is reproduced in Respondent's Appendix at A4-A6. In accordance with a subsequent order, the Facility was constructed in 1978 by EBMUD and the Regional Board, partly on EBMUD's property. At the time that EBMUD and the Regional Board contemplated action to comply with the abatement order, the Clean Water Act prohibited the discharge of pollutants from a point source into navigable waters without a permit.

The Facility is a contained system of ponds or impoundments designed to collect, store, evaporate, and occasionally discharge leachate. It is depicted on the diagram included in Petitioners' Appendix at A62. Constructed berms attempt to divert the waters of Mine Run and Hinkley Run creeks around the mine site and into Camanche Reservoir. During rainy weather, surface flows from the mine site itself (including land owned by EBMUD) are collected and channelled into Mine Run Dam Reservoir. The reservoir was designed to capture and store the runoff so that it could evaporate. To enhance that evaporation, the former streambeds of Mine Run and Hinkley Run creeks were transformed into two series of cascading impoundments, through which leachate flows downhill into Mine Run Dam Reservoir. A pump then recirculates leachate from the reservoir back to the upper impoundments in what used to be Mine Run creek, from where it gradually returns to the reservoir again. The upper impoundments, as well as the walls of

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waste where it will likely be discharged, or created a nuisance or condition of pollution.

the reservoir, consist of reactive tailings and waste rock from the site.[2]

Lacking enough storage capacity to contain the runoff produced over a typical winter rainy season, the Facility periodically discharges untreated effluent into the Mokelumne River through a spillway and valve located at the dam. When discharging, the Facility acts as a conduit conveying runoff collected from the site directly into the river.

EBMUD designed and built the dam and reservoir. As EBMUD's partner, the Regional Board was responsible for building and maintaining a major portion of the Facility, including the upper impoundments, creek diversion structures and recirculation system. The Regional Board purchased the pump and pipe, pays the operating costs of the pump and regularly receives land use permits from the District for the portion of the Facility that is located on land owned by EBMUD.

After the Facility was built, the District and Regional Board entered into a formal Memorandum of Understanding ("MOU") that established the two agencies' respective rights and responsibilities for the operation of the Facility. The 1979 MOU is reproduced in the Respondent's Appendix at A7-A10. It acknowledges that both

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[2] The district court concluded that although disputes of material fact precluded the entry of summary judgment in favor of the Committee on the additional ground that the Facility's recirculation and ponding system increased the production of acid mine drainage at the site, the Committee presented "ample evidence" that such was the case. Petitioners' Appendix at A39, n. 20.

agencies planned that "releases of waters from the impoundment reservoir [would] occur periodically." Respondent's Appendix at A9. The MOU further provides that the "quantity and timing of planned releases" of acid mine drainage are subject to the "mutual agreement" of EBMUD and the Regional Board. *Id.* Thus, the consent of the Regional Board is required for every discharge from the Facility.

In accordance with the MOU, an average of over 19 million gallons of contaminated water per year was discharged through controlled releases and uncontrolled spills from the discharge valve and spillway into the Mokelumne River between 1976 and the onset of California's drought in 1986. Despite those spills and releases, petitioners have doggedly maintained that they, unlike the former land owner, are free to discharge whatever and whenever they choose. Nevertheless, that steady pattern of releases and spills became the focus of federal regulatory concern. In September 1990, the Environmental Protection Agency ("EPA"), acting pursuant to Section 304(l) of the Clean Water Act, 33 U.S.C. § 1314(l), determined that the Facility was a "point source" impairing the Mokelumne River, and therefore a permit was necessary for any discharges. That determination was made over the same objections petitioners raise in this Court.

During the drought, there were no further discharges from the Facility, but the usual releases resumed with the return of normal rainfall last winter. When those discharges appeared imminent in February, 1993, EPA issued an emergency order directing EBMUD to mitigate the impacts of the releases from the Facility, which ultimately totalled millions of gallons. EPA's "Findings of Violation and Order" was issued under Sections 308(a) and 309(a)

of the Act, 33 U.S.C. §§ 1318(a) and 1319(a), respectively, based upon its determination that the discharges from the Facility violated the Act's permit requirements. That order was subsequently revised several times.

At no time prior to the court of appeals' decision did petitioners ever apply for a permit authorizing their discharges from the Facility.

### B. Litigation History

This action was brought by the Committee under the citizen suit provision of the Act in Section 505(a)(1), 33 U.S.C. § 1365(a)(1). On March 3, 1993, the District Court for the Eastern District of California granted the Committee's motion for partial summary judgment as to the petitioners' violation of Section 301(a) of the Clean Water Act, which provides that the "discharge of any pollutant by any person" without, *inter alia*, an NPDES permit pursuant to Section 402(a) is illegal. Petitioners' Appendix at A64.

On petitioners' appeal, the Ninth Circuit subsequently affirmed, concluding that District Judge Karlton's "well-written [and] well-reasoned" decision correctly held the petitioners liable under the Clean Water Act for discharging pollutants without a permit. Petitioners' Appendix at A2. Petitioners' subsequent request for rehearing or rehearing *en banc* was denied.

## REASONS FOR DENYING THE PETITION

### I. Summary of Argument

The petitioners offer no substantial reason, under Supreme Court Rule 10.1 or any other provision of law, why this Court should grant review. The Ninth Circuit's opinion applies established principles defining what constitutes the addition of a pollutant to navigable waters from a point source for purposes of Section 301(a)'s prohibition. In applying those principles, the court of appeals appropriately considered the special features of the Facility that distinguish it from the wide variety of equipment and structures addressed in other decisions concerning the Act's permit requirement, and it applied those principles consistent with EPA's independent assessment of the Facility.

The analysis by which the Ninth Circuit concluded that the discharges here require a permit does not, either directly or by implication, conflict with the District of Columbia Circuit's affirmance of EPA's regulatory treatment of a fundamentally different project and distinct pollutants in *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982). No conflict between the courts of appeal can be conjured up from the Ninth Circuit's unremarkable conclusion that this leachate collection system is not identical to a conventional dam.

In concluding that EBMUD and the Regional Board are obliged to obtain an NPDES permit for their unauthorized discharges, the Ninth Circuit also correctly applied the broad scope of liability under Section 505(a)(1) of the Act, which makes "any person (including (i) the United States, and (ii) any other governmental

instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution)" subject to suit. The petition asserts that the Ninth Circuit has misconstrued the Clean Water Act by failing to recognize an implied exception to its unambiguous language which petitioners claim can be extrapolated from the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").

But no such exemption exists, and the lack of any statutory immunity for state agencies (much less a utility district acting to comply with an enforcement order directed against it) in the Clean Water Act reflects a choice by Congress that none is appropriate here. Even under the exception provided in CERCLA, the petitioners' proprietary roles as partners in the offending discharges would render each of them liable in this instance.

## II. Argument

The overriding objective of the Clean Water Act is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Section 301(a) of the Act prohibits all discharges of pollutants to waters of the United States from identifiable sources (called "point sources"), except under specified conditions. 33 U.S.C. § 1311(a). Section 402 establishes a comprehensive scheme known as the National Pollution Discharge Elimination System ("NPDES") for regulating the discharge of pollution otherwise prohibited by Section 301(a). 33 U.S.C. § 1342; *Trustees for Alaska v. E.P.A.*, 749 F.2d 549, 553 (9th Cir. 1984); *see generally E.P.A. v.*

*California ex rel. State Water Resources Control Board*, 426 U.S. 200, 205 (1976); *Westvaco Corp. v. E.P.A.*, 899 F.2d 1383, 1384-87 (4th Cir. 1990). The NPDES permit is the critical mechanism by which general effluent limitations and other water quality standards are translated into enforceable obligations that control specific discharges. *E.P.A. v. California*, 426 U.S. at 205.

The facts and the relevant judicial precedent show that the Ninth Circuit was squarely within established law in affirming the district court's holding that the discharges from the Facility require an NPDES permit. Although petitioners would have it otherwise, discharges from similar waste water collection systems, even those containing instream treatment ponds, have been judicially held subject to the permit requirements of the Act. There is no conflict among the courts of appeal as to that interpretation of the Act.

### A. The Facility Discharges Pollutants From Point Sources That Must Be Regulated By An NPDES Permit

#### 1. The Clean Water Act

Under the Act, the term "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from a point source." 33 U.S.C. § 1362(12). In its regulations interpreting the Act, EPA has more specifically defined "discharge of a pollutant" to include "surface runoff which is collected or channelled by man." 40 C.F.R. § 122.2. "Pollutants" include biological materials and municipal, industrial or chemical wastes such as acid mine drainage. 33 U.S.C. § 1362(6). Here, contaminated

leachate is collected by the Facility, channelled into the reservoir and thereafter released through the spillway and discharge valve at the dam. Under 40 C.F.R. § 122.2, the Facility "discharges pollutants" into the Mokelumne River.

A point source is defined to be "any discernable, confined and discrete conveyance, including but not limited to any pipe, . . . channel, . . . [or] conduit . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). As the district court found, and the court of appeals confirmed, the discharge valve and spillway on the dam are such conveyances through which pollutants flow into the river. Discharges from the Facility thus constitute the addition of pollutants from a point source to navigable waters without an NPDES permit, and as such are prohibited by Section 301(a) of the Act.

### 2. EPA's Construction of the Act

Pursuant to Section 304(l), EPA is required to identify the impaired waters of California, including those waters that are not expected to achieve applicable water quality standards "due entirely or substantially to discharges from point sources of any [priority] toxic pollutants." 33 U.S.C. § 1314(l)(1)(B). EPA has identified the Mokelumne River as an impaired body of water, and has identified the Facility as the only point source of toxic pollutants responsible for impairing the river.[3]

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[3] EPA re-assumed exclusive permitting authority for the Facility based upon the failure of the petitioners to submit an

EPA's "Response to Comments" on its decision to list the Facility as a point source under Section 304(l) of the Act concluded that "EBMUD has the duty to apply for an NPDES permit governing discharges from point sources at [the dam and reservoir]." The relevant portion of the Response to Comments is produced in the Respondent's Appendix at A11-A17.

EPA's emergency action responding to the 1993 spills reaffirmed its determination that discharges from the Facility require an NPDES permit. By an order issued in April, 1993 pursuant to Sections 308(a) and 309(a) of the Act, EPA directed EBMUD to reduce inflow into the reservoir and mitigate the impacts of further point source releases from the Facility. The most recent version of EPA's Order, dated June 16, 1994, is reproduced in the Respondent's Appendix at A18-A33. The order states "[t]he discharge valve and spillway on the dam are 'point sources,' " and that EBMUD "has discharged 'pollutants' " from them. Respondents Appendix at A20.

### 3. The Case Law

The Ninth Circuit's decision here is squarely in line with settled precedent recognizing that the Act prohibits unregulated discharges of pollutants from confined waste collection systems like the Facility. *E.g., United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) (discussed below); *O'Leary v. Moyer's Landfill, Inc.*, 523 F.

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individual control strategy adequate to regulate the discharges from the Facility so that the Mokelumne River could meet water quality standards within three years. *See* 33 U.S.C. § 1314(l)(1)(D).

Supp. 642, 655 (E.D. Pa. 1981) (leaks from landfill leachate collection system, emanating from landfill's overflowing ponds, collection tank bypasses, cracks and defects, gullies, trenches, and ditches, were point source discharges); *Hudson River Fishermen's Ass'n v. City of New York*, 751 F. Supp. 1088, 1101-02 (S.D.N.Y. 1990) (discharge of chlorine and alum floc into a reservoir on a navigable river as a result of adding chlorine and alum to water pumped from another river required NPDES permit), *aff'd*, 940 F.2d 649 (2d Cir. 1991). That such systems could reduce pollution did not eliminate the obligation to secure a permit for any discharges.

In *Earth Sciences, Inc.*, the Tenth Circuit found that overflows and leaks from a collection system catching leachate, rainfall and snowmelt runoff from a heap leach mining operation constituted point source discharges under the Act. 599 F.2d at 374. The impoundment system at the Facility is similar to the leachate collection and circulation system in *Earth Sciences*, which utilized a "sump pit," defined as "a pit at the lowest point in a circulating or drainage system," as part of its closed circulation system. *Id.* The court found that "when [that system] fails because of flaws in the construction or inadequate size to handle the fluids utilized, with resulting discharge, whether from a fissure in the dirt berm or overflow of a wall, the escape of liquid from the confined system is from a point source." *Id.* The analogous discharges from the Facility reservoir caused by its inadequate capacity or flaws in its construction are similarly point source discharges.

Moreover, the fact that some of the polluted waters or acid mine drainage in the reservoir may enter the

impoundment system from outside the Facility[4] does not relieve the petitioners from liability. Contaminated surface runoff, once channeled or collected, constitutes a point source discharge regardless of the fact that the waters may originate as rainfall. *Sierra Club v. Abston Construct. Co., Inc.*, 620 F.2d 41, 44-45 (5th Cir. 1980) ("surface runoff from rainfall, when collected or channeled by coal miners in connection with mining activities, constitutes point source pollution"); *see also Trustees for Alaska*, 749 F.2d at 558, in which the Ninth Circuit adopted the Tenth Circuit's reasoning from *Earth Sciences, Inc.*, to determine that discharges from a sluice box used in placer mining operations were point source discharges: "point sources and nonpoint sources are not distinguished by the kind of pollution they create or by the activity causing the pollution, but rather whether the pollution reaches the water through a confined, discrete conveyance." That same rule applies here.

Whether petitioners are solely responsible for the pollutants that the Facility collects and discharges is irrelevant; it is sufficient that they control the ultimate discharge. In *Friends of Sakonnet v. Dutra*, 738 F. Supp. 623, 629-30 (D.R.I. 1990), the owner of a private septic system was held liable for discharges of raw sewage into a river, although others were responsible for originally producing the sewage flowing into the septic system.

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[4] It is undisputed that some of the polluted waters directed into the reservoir originates as surface runoff from EBMUD's property. For example, some of the contaminated water is introduced into the Facility through a diversion ditch constructed to carry runoff from a tailings pile across EBMUD's property. *See* diagram, Petitioners' Appendix at A62.

### B. The Facility Is Not A Conventional Dam That Merely Impounds Navigable Water

As the district court found, and the Ninth Circuit affirmed, the Facility is a leachate collection system and not simply a dam that does no more than store water for future beneficial use. It was built to segregate polluted waters, and to collect and contain them in a series of impoundments culminating in the reservoir. A pumping system was installed to maximize evaporation and storage capacity. None of those features is part of a water storage dam.

EPA, the district court and the court of appeals all agreed that those functions distinguish the Facility from conventional dams. Accordingly, they all found that because the Facility is a leachate collection system, its discharges of acid mine drainage collected and channelled from the site are subject to the permitting requirements of the Act. As petitioners have done without success at each stage of this litigation, they argue once more that because the Facility includes a dam and reservoir as part of the system, it must be analyzed as if it were no more than a dam and reservoir.

In arguing that the Facility must be considered as merely a storage dam, the petitioners posit that the Committee must prove that the Facility "adds" pollutants to the leachate *already contained in* the reservoir in order for the Facility to constitute a point source. In support of this argument, petitioners rely on cases in which courts have held that certain storage or hydroelectric dams that

merely impound the flow of navigable waters on a temporary basis are not point sources for the purposes of the Act. Those decisions approve EPA's interpretation of the Act by which the inevitable chemical, thermal and hydrological effects of impounding water are not deemed to be the addition of pollutants. *E.g., National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) ("dam-induced" water quality changes, including low dissolved oxygen, dissolved minerals and nutrients, water temperature changes, sediment release and supersaturation associated with impoundment are not "pollutants" added to a navigable water from a point source); *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) (operation of a hydroelectric dam which dismembers fish moving through it from one navigable body of water to another is not a point source adding pollutants to navigable water); *U.S. ex rel. Tenn. Valley Authority v. Tennessee Water Quality Control Bd.*, 717 F.2d 992 (6th Cir. 1983) (the operation of a hydroelectric dam and flume on a navigable river causing water quality changes did not constitute a point source of pollutants under the Act where there was no claim that any "pollutants" were added to the river by diversion into or through the flume), *cert. denied*, 466 U.S. 937 (1984); *Missouri ex rel. Ashcroft v. Department of the Army*, 672 F.2d 1297 (8th Cir. 1982) (soil erosion and reduction of oxygen content of water caused by release from a hydroelectric dam did not constitute addition of a "pollutant" from a point source).

Those cases are not controlling here because acid mine drainage is not merely the by-product of storing water that enters the reservoir as navigable water from Mine Run and Hinkley Run creeks. Acid mine drainage

originating at the site[5] is present in the reservoir as the result of its deliberate introduction through man-made ditches and repeated re-introduction as a result of the Facility's recirculation system. That is sufficient to constitute the addition of pollutants when site runoff is ultimately released by the discharge valve or spillway, even if mixed with leakage through the diversion berms on the two creeks.

Notwithstanding its regulatory treatment of conventional dams sustained in *Gorsuch*,[6] EPA concluded that the Act requires a different result for the Facility. The Facility should *not* be analyzed as if it were a conventional dam.

EPA's independent analysis confirms that, consistent with *Friends of Sakonnet*, the fact that *some* acid mine drainage may be present in undiverted creek flows entering the facility is irrelevant:

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[5] Any "navigable water" that may be present in the reservoir as a result of the Facility's unsuccessful diversion of Hinkley and Mine Run Creeks is mixed with water entering the Facility's impoundments as groundwater, seepage, or surface runoff, which is not navigable water. The resulting discharge from the reservoir undisputedly includes non-navigable waters introduced for the first time into the navigable waters of the river.

[6] *Gorsuch* makes clear, however, that dams are not categorically immune from the Act's permit requirements. *Gorsuch*, 693 F.2d at 165, n.22 ("a dam can, in some circumstances, be a 'point source'"). The *Gorsuch* court also confirms that its holding is not inconsistent with the analyses of different circumstances in *Earth Sciences* and *Abston Construction* that channelized surface runoff discharged into navigable water constitutes the addition of pollutants from a point source. *Id.* at 175, n.58.

> The fact that the major source of pollutants in the [reservoir] is leachate from tailings located predominately on property not owned by EBMUD is an insufficient reason to omit EBMUD's point source discharges from the section 304(l)(1)(C) source list. NPDES permits routinely regulate point sources (e.g., publicly owned treatment works, privately owned treatment works, and storm water dischargers) which discharge pollutants originally generated on property owned by persons other than the permit holder. *See* 40 C.F.R. 133, regarding publicly owned treatment works; and 40 C.F.R. 122.26, regarding storm water dischargers.

Respondent's Appendix at A16.

Petitioners' insistence that the Facility can only be analyzed as if it were a conventional dam also treats the presence of any navigable waters in the reservoir as a talisman which absolves petitioners of the obligation to obtain a permit for their subsequent discharges of those waters. Here again, a waste collection facility (such as the Facility) which contains navigable waters is nonetheless subject to the requirements of the Act. *West Virginia Coal v. Reilly*, 728 F. Supp. 1276, 1281 (S.D.W.Va. 1989), *aff'd mem.*, 932 F.2d 964 (4th Cir. 1991).

In *West Virginia Coal*, the court affirmed EPA's authority to issue NPDES permits for instream treatment ponds used to collect channeled runoff from coal mine waste fill. Like the Facility's impoundments, the treatment ponds were "generally . . . constructed by filling the stream at a designated location with earth and rock to create an embankment or dam which causes the water to pond." *Id.* at 1281. As in the present case, "[t]he primary

purpose of the pond is to allow sediment suspended in the runoff to 'settle out' of the water. The water is then discharged from the pond back into the existing stream through an outlet." *Id.* Significantly, it was undisputed by the parties in *West Virginia Coal* that the discharges from the treatment pond into the stream required an NPDES permit. *Id.* EPA's analysis of the waste treatment pond in *West Virginia Coal* as an instream treatment system rather than a conventional dam supports the Ninth Circuit's conclusion here for a similar project.

### C. The Language of the Clean Water Act And Its Legislative History Demonstrate That Even State Agencies Acting As Polluters Are Subject To Suit

The petition argues that, even if discharges from the Facility are subject to Section 301(a), EBMUD and the Regional Board cannot be made to comply with the Act's permit requirement. That argument proceeds without any support from the language or legislative history of Sections 301(a) and/or 505(a) of the Clean Water Act. It is constructed, instead, of policy – petitioners postulate that a greater number of abatement efforts, even ones not in compliance with regulatory requirements, would better serve the quality of the nation's waters than fewer abatement efforts that meet all applicable environmental standards. Whatever the merits of that postulate may be, however, they are irrelevant here because Congress has chosen a different path – a choice that only Congress has the power to undo. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978) (the wisdom of a course clearly chosen by Congress is not subject to judicial second-

guessing); *see Miller v. Youkam*, 440 U.S. 125, 141 n.21 (1979) (issues of legislative policy are "better addressed to the wisdom of Congress than to the judgment of this Court"), *quoting Marquette Nat'l Bank v. First of Omaha Service Corp.*, 439 U.S. 299, 319 (1978).

Congress clearly contemplated that those to be held accountable for compliance with effluent standards or limitations under the Act could include state or local government, as well as other public entities such as utility districts, rather than private industry alone. At the same time the Act created a division of responsibility between the States and federal government to control pollution, Congress also provided that any arm of state or local government subject to the constitutional power of federal courts was made subject to citizen suits under the Act where there was a violation of effluent standards or limitations.

### 1. The Act's Unambiguous Language Confirms That There is no Shield for the States Acting as Private Polluters

The Act does indeed speak directly to the liability of the State and its subdivisions in this instance. In Section 505(a), the only limitations on liability acknowledged by Congress covering those actually in violation of an effluent standard or limitation[7] are the constitutional constraints independently imposed by the Eleventh

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[7] Section 505(f), 33 U.S.C. § 1365(f), defines an "effluent standard or limitation" to include any "limitation" under Section 301. There is no "violation of an effluent standard or limitation" for purposes of Section 505(a)(1), however, where a state

Amendment. The Act creates no limitations whatsoever upon the remedial jurisdiction of a district court to "enforce . . . an effluent standard or limitation" against "any person . . . in violation of . . . an effluent standard or limitation under this chapter." 33 U.S.C. § 1365(a). "Person" is defined, in turn, by Section 502(5) of the Act, 33 U.S.C. § 1362(5), to include any "individual, corporation, partnership, association, State, municipality, commission or political subdivision of a State or any interstate body." By its terms, that liability embraces both petitioners.

The broad sweep of remedial liability in Section 505(a) was an integral part of the Act when it was passed

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regulatory agency that is not a discharger itself merely fails to take enforcement action to stop pollution by third parties. *See*, for example, *Ringbolt Farms Homeowners Ass'n v. Town of Hull*, 714 F. Supp. 1246, 1256 (D. Mass. 1989). That limitation of liability does not apply, however, "to the extent that the state is an actual discharger of pollutants in violation of the Act." *Id.* at 1253.

The district court found, as a matter of undisputed fact, that the Regional Board exercised " 'control,' 'authority,' and 'affirmative actions' over discharges at the Penn Mine facility," as well as contractual veto power over each discharge. Petitioners' Appendix at A42-A44. That active role was sufficient to render the Regional Board liable under the Act as an actual discharger rather than an unresponsive enforcer. EBMUD's new argument that it is also entitled to treatment as a non-discharging state regulatory agency fails as a result of its similar control and authority over discharges here, coupled with its principal ownership of the Facility itself.

in 1972,[8] and it remained essentially the same through the major overhaul of the Act in 1987.

Section 301(a)'s prohibition of discharges without a permit is equally broad, providing that such a discharge by "any person" is unlawful. Like the citizen suit provision, the Act's permit requirement was a long-standing feature of the legislation at the time the Facility was designed and built. 86 Stat. 816, 844; *see Arkansas v. Oklahoma*, 112 S.Ct. 1046, 1054 (1992).

In light of the statute itself, there is no basis for petitioners' claim that Congress did not understand that "polluters" might include public agencies. On the contrary, the Senate Committee on Public Works explicitly affirmed that the all-inclusive language of Section 301(a) conveys the judgment that, "No one has the right to pollute." S. Rep. No. 414, 92nd Cong., 1st Sess. 43 (1971). That judgment precludes petitioners' claim that good intentions grant them such a right.

### 2. That Congress Elected Not To Transplant CERCLA's Limitations on Liability for Cleanup Costs to the Clean Water Act Demonstrates That No Immunity Was Intended

The court of appeals noted that the statutory exemptions that petitioners cite are found only in CERCLA, not

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[8] Section 505(a)'s citizen suit provision was also an integral part of Pub. L. 92-500, 86 Stat. 816. It reflects the purpose of the 1972 legislation to facilitate enforcement against dischargers. 86 Stat. 816, 888. *E.P.A. v. California ex rel. State Water Resources Control Board*, 426 U.S. at 204.

in the Clean Water Act. Because those exemptions do not apply here by their own terms, reasoned the court of appeals, they could not rescue the petitioners from liability for their failure to comply with the Act's permit requirement.

The proposition that Congress desired to grant immunity from the duty to comply with applicable effluent standards or limitations for state regulatory agencies, based upon the different exemptions added to CERCLA as part of the 1986 amendments[9] is refuted by the failure of Congress to actually incorporate any such exemption into Sections 505(a) or 301(a) of the Clean Water Act

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[9] Sections 101(b) and 107(c) of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, 100 Stat. 1613, added the liability limitations to CERCLA upon which petitioners rely. 100 Stat. 1615 and 1629. The exemption that petitioners claim is implied in the Clean Water Act, however, is broader than that afforded by CERCLA.

CERCLA's exemption applies to cleanup costs recoverable under the statute or other financial liability, *not* to compliance with regulatory requirements. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a) extends the liability for such costs to "the owner and operator . . . of a facility." Section 107(d), 42 U.S.C. § 9607, confers immunity upon those rendering non-negligent care, assistance, or advice in accordance with the National Contingency Plan. Section 101(20)(D), 42 U.S.C. § 7601(20)(D), also excludes from those liable units of state and local government involuntarily acquiring ownership of property in their role as sovereigns. The latter specifically excludes any protection for such agencies where they cause or contribute to a release of hazardous substances.

The petitioners' deliberate discharge of toxic pollutants from a site voluntarily acquired by EBMUD for proprietary purposes would not qualify for any exemption, as discussed in the text below.

when it was amended the following year. The silence of the 1987 amendments to the Clean Water Act regarding immunity for regulatory agencies must be presumed to reflect Congressional knowledge of the liability exceptions provided for such agencies in CERCLA the year before. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). The differences between the two statutes maintained by the 1987 amendments to the Clean Water Act cannot be judicially swept aside without violating Justice Scalia's admonition in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 101 (1991) that, "it is not our function to eliminate clearly expressed inconsistency of policy, and to treat alike subjects that different Congresses have chosen to treat differently." Petitioners ask this Court to do no less.

Those principles confirm the conclusion of the court of appeals that: "Given the absence of *any* statutory authority to exempt the Board or District from liability under the Clean Water Act, the district court did not err in finding that defendants were liable under the Act." Petitioners' Appendix at A11 (emphasis in original).

### D. Even If the CERCLA Exemptions Applied To Citizen Suits Under the Clean Water Act, The Regional Board Would Still Be Liable.

Petitioners' plea to create a judicial exception to the Clean Water Act's liability scheme fails to acknowledge the district court's alternative ruling that the CERCLA exemptions would not be sufficient to avoid liability as a

question of fact, even if they applied. Petitioners' Appendix at A50-A51. Denying the application of CERCLA's exemptions in this instance as a matter of law works no injustice.

Under CERCLA, an agency that controls polluting activity may indeed be liable for cleanup costs, notwithstanding its separate function as an environmental regulator. *See, U.S. v. Stringfellow*, 31 E.R.C. 1315, 1320 (C.D. Cal. 1990) (state liable based upon involvement with site and release). Because the Regional Board (and EBMUD) are much more than passive agency bystanders here, petitioners' argument that they would be immune from any judicial remedy under CERCLA proceeds from a factual premise already determined by the district court to be "faulty." Petitioners' Appendix at A50. Petitioners never appealed that factual determination.

## CONCLUSION

The determination shared by EPA and both courts below that there is indeed a violation of an emission standard or limitation here flows directly from the application of established precedent defining what discharges are subject to Section 301(a)'s prohibition to the particular (and perhaps unique) circumstances of this case.

Nevertheless, petitioners insist that they should remain free to discharge whatever and whenever they like. The Mokelumne River must be sacrificed, they say, to ratify well-intentioned but misguided efforts to reduce water pollution undertaken as part of EBMUD's role as a private landowner and holder of water rights on the

river. That is not what Congress mandated – the obligation to comply with the Clean Water Act is not nullified by good intentions where a violation of an effluent standard or limitation exists. No new exemption to that judgment should be created in this case.

DATED: August 24, 1994.

Respectfully submitted,

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*Attorneys for Respondent Committee to Save the Mokelumne River*

UNITED STATES CODE SERVICE

TITLE 33. NAVIGATION AND NAVIGABLE WATERS

CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL

STANDARDS AND ENFORCEMENT

**33 USCS § 1314**

**§ 1314. Information and guidelines [FWPCA § 304]**

**(*l*) Individual control strategies for toxic pollutants**

**(1) State list of navigable waters and development of strategies**

Not later than 2 years after February 4, 1987, each State shall submit to the Administrator for review, approval, and implementation under this subsection –

**(A)** a list of those waters within the State which after the application of effluent limitations required under section 1311(b)(2) of this title cannot reasonably be anticipated to attain or maintain (i) water quality standards for such waters reviewed, revised, or adopted in accordance with section 1313(c)(2)(B) of this title, due to toxic pollutants, or (ii) that water quality which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water;

**(B)** a list of all navigable waters in such State for which the State does not expect the applicable standard under section 1313 of this title will be achieved after the requirements of sections 1311(b), 1316, and 1317(b) of this title

are met, due entirely or substantially to discharges from point sources of any toxic pollutants listed pursuant to section 1317(a) of this title;

(C) for each segment of the navigable waters included on such lists, a determination of the specific point sources discharging any such toxic pollutant which is believed to be preventing or impairing such water quality and the amount of each such toxic pollutant discharged by each such source; and

(D) for each such segment, an individual control strategy which the State determines will produce a reduction in the discharge of toxic pollutants from point sources identified by the State under this paragraph through the establishment of effluent limitations under section 1342 of this title and water quality standards under section 1313(c)(2)(B) of this title, which reduction is sufficient, in combination with existing controls on point and nonpoint sources of pollution, to achieve the applicable water quality standard as soon as possible, but not later than 3 years after the date of the establishment of such strategy.

**(2) Approval or disapproval**

Not later than 120 days after the last day of the 2-year period referred to in paragraph (1), the Administrator shall approve or disapprove the control strategies submitted under paragraph (1) by any State.

**(3) Administrator's action**

If a State fails to submit control strategies in accordance with paragraph (1) or the Administrator does not approve the control strategies submitted by such State in accordance with paragraph (1), then, not later than 1 year after the last day of the period referred to in paragraph (2), the Administrator, in cooperation with such State and after notice and opportunity for public comment, shall implement the requirements of paragraph (1) in such State. In the implementation of such requirements, the Administrator shall, at a minimum, consider for listing under this subsection any navigable waters for which any person submits a petition to the Administrator for listing not later than 120 days after such last day.

# CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD CENTRAL VALLEY REGION

## CLEAN-UP AND ABATEMENT ORDER FOR EAST BAY MUNICIPAL UTILITY DISTRICT CALAVERAS COUNTY

The California Regional Water Quality Control Board, Central Valley Region, (hereafter Board) finds that:

1. The East Bay Municipal Utility District (EBMUD) owns and operates Camanche Lake, located on the Mokelumne River immediately below Pardee Dam.

2. Current drought conditions have resulted in abnormally low water levels in Camanche Lake to the extent that the upper one-third of the Lake bottom is exposed. Included in the exposed areas is Oregon Bar, a natural gravel bar of the Mokelumne River which was formed prior to construction of Camanche Dam.

3. Investigation by the Department of Fish and Game and Regional Board staff demonstrates toxic levels of copper and zinc to be present throughout Oregon Bar as a result of downstream moving sediments originating from the Penn Mine Property.

4. The beneficial uses of Camanche Lake and Mokelumne River, include: domestic and agricultural supply; recreation; esthetic enjoyment; and preservation and enhancement of fish, wildlife, and other aquatic resources.

5. An extensive salmon and steelhead hatchery is operated by the Department of Fish and Game on waters from Lake Camanche.

6. The Department and Fish and Game and Regional Board staff have determined it is highly probable that

major fish kills will occur in Lake Camanche and downstream Mokelumne River waters due to high reservoir inflows through exposed muds at Oregon Bar and other upstream sources. Scouring flows will resuspend sediments thereby introducing lethal concentrations of copper and zinc into the aquatic environment. This has caused, and threatens to cause, conditions of pollution and nuisance and unreasonably affect the beneficial uses of Camanche Lake and the Mokelumne River:

7. Section 13304(a) of the California Water Code states:

> "Any person who discharges waste into the waters of this state in violation of any waste discharge requirement or other order issued by a Regional Board or the State Board, or who intentionally or negligently causes or permits any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the Regional Board, clean up such waste or abate the effects thereof or, in the case of threatened pollution or nuisance, take other necessary remedial action. Upon failure of any person to comply with such Clean-Up or Abatement Order, the Attorney General, at the request of the Board, shall petition the superior court for that county for the issuance of an injunction requireing such person to comply therewith. In any such suit, the court shall have jurisdiction to grant a prohibitory or mandatory injunction, either preliminary or permanent, as the facts may warrant."

IT IS HEREBY ORDERED, that pursuant to Section 13304 of the California Water Code, East Bay Municipal Utility

District shall clean-up and abate the effects of toxic sediments contained in Camanche Lake as follows:

1. Initiate forthwith, corrective actions necessary to prevent toxic levels of copper and zinc from polluting waters of Camanche Lake and downstream waters from sediments now situated in the vicinity of Oregon Bar and elsewhere as warranted.

1. Submit to the Board by 14 October 1977 a technical engineering report describing (1) methods being used and that will be used to achieve compliance with Order Number 1 above; and (2) defines the areal extent of toxic sediment.

3. Complete all work defined in Order Number 1 above by 1 December 1977.

/s/ J. A. Robertson
JAMES A. ROBERTSON,
Executive Officer

# MEMORANDUM OF UNDERSTANDING BETWEEN CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, CENTRAL VALLEY REGION CALIFORNIA DEPARTMENT OF FISH AND GAME AND EAST BAY MUNICIPAL UTILITY DISTRICT CONCERNING ABATEMENT OF POLLUTION FROM NEW PENN MINES

The parties to the Memorandum of Understanding are the California Regional Water Quality Control Board, Central Valley Region, hereinafter called "Board," the California Department of Fish and Game, hereinafter called "Fish and Game," and the East Bay Municipal Utility District, hereinafter called "District."

The parties are mutually concerned with the threat of and with actual pollution of the waters of the Mokelumne River and of the District's Camanche Reservoir by runoff carrying heavy metals and other mineral pollutants from a nonoperating mine owned by New Penn Mines, Inc., located adjacent to District's Camanche Reservoir property in Calaveras County.

The Board has taken various enforcement actions over many years' time in an effort to have the threat of pollution eliminated or abated by the owners of the New Penn Mine, Inc., but such efforts have to date been unsuccessful. Enforcement actions taken by the Board in 1977 and 1978 did not result in any responsive action by the mine owners.

In 1977, the District removed toxic silts from Oregon Bar, located within the District's Camanche Reservoir at a point close to the points of discharge from New Penn Mine onto the District's property. This action was intended to eliminate the possibility of further pollution

of the waters of Camanche Reservoir and of the Mokelumne River as increased flows began to pass by and over the Oregon Bar when Camanche Reservoir's water surface elevation began to rise after the conclusion of the 1976-77 drought.

In early 1978, the District and Board, with cooperation from Fish and Game, undertook considerable construction work intended to divert uncontaminated runoff flow away from and around contaminated areas of the New Penn Mine, and to impound runoff from contaminated areas of the mine in order to capture this flow and prevent it from entering Camanche Reservoir. The Board and District jointly undertook the engineering work required for the works to divert uncontaminated runoff around and away from contaminated areas of the mine. The Board undertook work required to construct the various works located above and on the mine site to divert the uncontaminated runoff around and away from the mine, including diversion channels, evaporation ponds, and related work. The District undertook work required to design and construct a dam and impoundment reservoir on the District property at the mouth of Mine Run Creek to capture runoff from the adjacent mine site.

All the work undertaken by the Board and by the District, which is only generally described herein, was made possible by close cooperation between the Board, Fish and Game, the District, and other affected state and federal agencies. The work had to be accomplished in a very short time period, using limited resources and under restrictive physical conditions. The work had to be undertaken after the beginning of the rainy season in the winter of 1977-78, which limited the time during which

construction work could be carried out. The works have been essentially completed by the Board and the District.

In recognition of the facts which have been generally summarized herein above, the parties hereto agree as follows:

1. The parties understand and acknowledge that the pollution abatement work hitherto performed by the Board and District was originally undertaken and was accomplished with the knowledge that it would not provide a complete and comprehensive solution to the threat of continued pollution emanating from the New Penn Mine site. Rather, the work was intended as an effort to achieve the best practicable pollution abatement system consistent with available time, resources, and money. The parties recognize that releases of waters from the impoundment reservoir into Camanche Reservoir will occur periodically. The quantity and timing of planned releases will be subject to mutual agreement by the parties to this Memorandum of Understanding.

2. The parties understand and acknowledge that the threat of future pollution not met by the pollution abatement system is caused by the site conditions of New Penn Mine, and is not caused by or contributed to by the nature, extent, design or construction of the system.

3. The Board will continue to utilize its authority in efforts to get the New Penn Mine, Inc., owners to accept responsibility or be found liable for the pollution abatement work heretofore done, and for any such work which may be required in the future. The board will make every effort to continue to maintain and operate those features of the pollution abatement system constructed by the Board. The Board will continue to cooperate with the other parties and with

other cognizant government agencies in efforts to abate the pollution emanating from New Penn Mine. The Board will also continue its efforts to recover from the owners of the New Penn Mine the costs of construction, operations and maintenance incurred by the Board and the District.

4. Fish and Game will continue to cooperate with the other parties in mutual efforts to identify, evaluate, and control pollution problems or threats thereof emanating from New Penn Mine.

5. The District will continue to cooperate with the board, Fish and Game, and other cognizant agencies in efforts to identify, evaluate, and control pollution problems or threats thereof emanating from New Penn Mine. In anticipation of an ultimate solution to the Penn Mine problem (which will include complete cost recovery by the District and the Board), the District will continue to operate and maintain those features of the pollution abatement system constructed by the District on District property.

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION DATED: 23 March, 1979

By /s/ James Robertson

CALIFORNIA DEPARTMENT OF
FISH AND GAME

By /s/ Robert Lassen

EAST BAY MUNICIPAL UTILITY DISTRICT

By /s/ John Harnett
General Manager

[LOGO]

United States Environmental Protection Agency
Region 9
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EPA Response to Comments and Petitions Regarding Listing Decisions for California Waters Under Section 304 (*l*) of the Clean Water Act

Second Printing

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## III. EPA RESPONSE TO COMMENTS AND PETITIONS

### CONCERN: MOKELUMNE RIVER

Comment #1 – California Sport Fishing Protection Alliance

1) East Bay Municipal Utility District (EBMUD) should be required to obtain a National Pollutant Discharge Elimination System (NPDES) permit for discharge of toxic metals into Camanche Reservoir.

*Response:* EPA concludes that Mokelumne River, at Camanche Reservoir, should be included on the section 304(*l*)(1)(B) short list, and that point sources at the Mine Run Dam and the Mine Run Dam Reservoir should be included on the section 304(*l*)(1)(C) source list.

EPA has determined that EBMUD has the duty to apply for an NPDES permit governing discharges from point sources at the Mine Run Dam and Mine Run Dam Reservoir. Therefore, EPA will be preparing an individual control strategy (ICS) consisting of a draft NPDES permit, to be held by EBMUD, with a schedule for issuing a final permit, and documentation which shows that the controls selected are appropriate and adequate.

2) The Lower Mokelumne River is impaired by discharge of EBMUD's Camanche Reservoir which resulted in a major fish kill of 20,000 steelhead trout per day.

*Response:* The EPA agrees with the State of California that the Lower Mokelumne River should be placed on the 304(*l*)(1)(A)(ii) long list because of water quality impairments causing fish kills and the threat of fish population declines. Of particular concern are the releases of waters from Camanche Reservoir containing elevated levels of hydrogen sulfide.

The EPA agrees with the State's conclusion that a substantial portion of the fishery resource problems are due to East Bay Municipal Utility District's operation of Pardee and Camanche Reservoir (Memorandum from the State Water Resources Control Board to Division of Water Rights, June 11, 1990. "Operation of Pardee and Camanche Reservoirs"). Specific recommendations have been developed by the State Water Resources Control Board for resolution of the problems in Lower Mokelumne River mentioned by the commenter. These recommendations include the establishment of a minimum pool elevation at Camanche Reservoir, dissolved oxygen, temperature and turbidity limits for reservoir discharges and the elimination of sudden high releases from Pardee Reservoir. The EPA encourages the resolution of water quality issues by State agencies for all waterbodies on the section 304(*l*)(1)(A)(ii) long list.

In addition, the EPA has determined that EBMUD is responsible for the discharge of toxic metals from Mine Run Dam Reservoir at the confluence of the Mokelumne River and Camanche Reservoir and that this discharge

results in exceedances of narrative water quality standards. Accordingly, the EPA concludes the Mokelumne River above Camanche Reservoir should be included on the section 304(*l*)(1)(B) short list.

**CONCERN: MOKELUMNE RIVER, PARDEE RESERVOIR, LAFAYETTE RESERVOIR**

Comment #2 – East Bay Municipal Utility District

1) EBMUD objects to being identified as the owner of the facility causing the condition in the Mokelumne River, and being subject to an individual control strategy. The sources of wastes are nonpoint sources originating on property of the abandoned New Penn Mine adjacent to property owned by EBMUD. EBMUD has assisted the State in protecting the Mokelumne River, including constructing an earthen embankment to prevent the wastes from flowing across EBMUD property and into the river. Run-off enters the Mokelumne River from many locations in the 450-acre drainage area. The State of California is the appropriate lead agency and party responsible for controlling the discharge of the nonpoint sources onto EBMUD's property.

*Response:* The New Penn Mine facility is located on two adjacent properties, one of which is owned by EBMUD. Several impoundments are located in the immediate vicinity of New Penn Mine. One of the impoundments and the dam creating it, the Mine Run Dam Reservoir and the Mine Run Dam, is on the property of, and was built by, EBMUD. EBMUD completed construction of the Mine Run Dam Reservoir and the Mine Run Dam in 1978. EBMUD designed the Mine Run Dam and the Mine Run Dam Reservoir to act as a catchment and evaporation pond for the runoff of heavy metal-laden, dilute sulfuric

acid solutions from the mine wastes and ore produced at the New Penn Mine facility.

EBMUD built the Mine Run Dam with a discharge valve with hand crank controls located at its north end.

EBMUD operates and maintains the Mine Run Dam and the Mine Run Dam Reservoir.

EBMUD and others cooperatively built other diversion structures and dikes in the immediate vicinity of Penn Mine, although not on property owned by EBMUD. EBMUD and others built the diversion structures and dikes concurrent with EBMUD's construction of the Mine Run Dam and the Mine Run Dam Reservoir. A pumping station is used to pump contents of the Mine Run Dam Reservoir to other impoundments in the vicinity of the New Penn Mine. The pumping station is located on EBMUD's property, although the cost of operation and maintenance of pumping is paid for by the Central Valley Regional Water Quality Control Board. An intended purpose of the pumping from the Mine Run Dam Reservoir to the other impoundments is evaporation. However, an unintended side effect is additional leaching of heavy metals and production of sulfuric acid from the ore and tailings within the dikes of the impoundments.

EBMUD makes "controlled releases" from the Mine Run Dam Reservoir into Camanche Reservoir. A staff report prepared in 1988 for the Central Valley Regional Water Quality Control Board indicates that, since 1978, controlled releases into Camanche Reservoir occurred every year (excepting dry or drought years 1985 and 1987) at a rate of usually 100 gpm, ranging from approximately 20 to 300 gpm for varying periods during the wet seasons.

The report further indicated that: spills or uncontrolled releases occurred during 1983 and 1986; the largest uncontrolled release occurred for a period of 43 days in 1986 when solutions from the Mine Run Dam Reservoir spilled out into Camanche Reservoir at a peak discharge rate of over 1200 gpm; the 1986 discharge totaled over 96 acre-feet; and the release averaged over 500 gpm during the 43 day period. As a result of the controlled and uncontrolled discharges, the U.S. EPA freshwater quality criteria for copper and zinc are frequently exceeded in Camanche Reservoir near the Mine Run Dam Reservoir.

The major source of pollutants in the Mine Run Dam Reservoir is leachate produced in tailings located predominantly on property not owned by EBMUD.

EBMUD holds no NPDES permit governing discharges from the Mine Run Dam or Mine Run Dam Reservoir.

EBMUD is the owner and operator of a point source through which EBMUD discharges pollutants. Notwithstanding that it may result from such natural phenomena as rainfall and gravity, the surface run-off of contaminated waters, once channeled or collected, constitutes discharge by a point source. See, *O'Leary v. Moyers Landfill, Inc.* 523 F. Supp. 642, 655 (E.D. Pa. 1981), and *Sierra Club v. Abston Construction Co.*, 620 F.2d 41, 47 (5th Cir. 198). The Mine Run Dam and the Mine Run Dam Reservoir is a leachate collection system. When that leachate collection system fails because of flaws in the construction or inadequate size to handle the fluids used, with resulting discharge, whether from a fissure in the dirt berm or overflow of a wall, the escape of liquid from the

confined system is from a point source. See, *Moyers Landfill, supra; U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979); and *Hudson River Fishermen's Association v. Westchester*, 686 F. Supp. 1044 (S.D.N.Y. 1988). The discharges here resulting from (1) "controlled releases" through the discharge valve located at the dam's north end, and (2) "uncontrolled releases" such as overflows of the Mine Run Dam Reservoir, constitute point source discharges.

The fact that the major source of pollutants in the Mine Run Dam Reservoir is leachate from tailings located predominantly on property not owned by EBMUD is an insufficient reason to omit EBMUD's point source discharges from the section 304(*l*)(1)(C) source list. NPDES permits routinely regulate point sources (e.g., publicly owned treatment works, privately owned treatment works, and storm water dischargers) which discharge pollutants originally generated on property owned by persons other than the permit holder. See: 40 C.F.R. 133, regarding publicly owned treatment works; and 40 C.F.R. 122.26, regarding storm water discharges.

The fact that the original source of the pollutants discharged by EBMUD may be from nonpoint sources located predominantly on property not owned by EBMUD likewise is an insufficient reason to omit EBMUD's point source discharges from the section 304(*l*)(1)(C) list. See: 40 C.F.R. 122.26, Storm Water Discharges; Notice of Proposed Rule, National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 53 Fed. Reg. 49,416, 49,430-32, 49,439-40 (Dec. 7, 1988); and *City of Detroit v. Michigan*, 803 F.2d 1411, 1421 (6th Cir. 1986). The

preamble to EPA's rulemaking related to the section 304(*l*) program confirms that stormwater discharges may be listed pursuant to section 304(*l*). See, 54 Fed. Reg. 23,868, 23,883 and 23,884 (June 2, 1989).

EPA has not determined that EBMUD is the only person that may have a duty to apply for an NPDES permit governing the discharge of pollutants from the vicinity of the New Penn Mine.

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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**REGION IX**

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| **IN THE MATTER OF:** | |
| East Bay Municipal Utility District Mine Run Dam Reservoir Calaveras County, California | Docket No. CWA-309-FY94-10 |
| Proceeding under Sections 308(a) and 309(a) of the Clean Water Act, [33 U.S.C. §1318(a) and §1319(a)] | FINDINGS OF VIOLATION AND ORDER FOR COMPLIANCE |

## STATUTORY AUTHORITY

The following Findings of Violation and Order is issued to the East Bay Municipal Utility District ("EBMUD") under authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") under sections 308(a) and 309(a) of the Clean Water Act ("Act"), 33 U.S.C. §§ 1318(a), 1319(a). This authority has been delegated to the Regional Administrator of EPA, Region IX, and by her, delegated to the Director, Water Management Division, EPA, Region IX ("Director").

## FINDINGS OF VIOLATION

The Director finds that EBMUD is in violation of Section 301(a) of the Act, 33 U.S.C. §1311(a), for unauthorized discharges of pollutants to waters of the

United States. These Findings are made on the basis of the following facts:

1. EBMUD is a municipal utility district established under the laws of California, and is a "person" within the definition set forth in Section 502(5) of the Act, 33 U.S.C. §1362(5).

2. In 1978, EBMUD participated in the construction of Mine Run Dam and Mine Run Dam Reservoir ("MRDR") in Calaveras County, California. Mine Run Dam and most of MRDR are located on property owned by EBMUD.

3. Mine Run Dam and MRDR, combined with a series of smaller impoundments, and various drainage ditches, pipes, valves, culverts and channels, are referred to as the "Penn Mine facility".

4. The Penn Mine facility is a contained collection and treatment system for polluted runoff, acid mine drainage, and leachate. The Penn Mine facility was designed to capture, contain and evaporate polluted runoff, acid mine drainage, and leachate through a ponding and recirculation system, and to release such contaminated waters from the Mine Run Dam and MRDR through a spillway and discharge valve into the Mokelumne River and Camanche Reservoir.

5. The ponding and recirculation system collect and concentrate polluted runoff and channel such runoff through EBMUD's property into MRDR. Some of the contaminated surface water infiltrates to the ground water, which flows toward Camanche Reservoir.

6. Releases of contaminated water have occurred through the discharge valve and through the spillway on Mine Run Dam. Such releases have entered the Mokelumne River and Camanche Reservoir.

7. The discharge valve and spillway on Mine Run Dam are "point sources," as defined in Section 502 (14) of the Act, 33 U.S.C. §1362(14). EBMUD is the owner or operator of those point sources, and has discharged "pollutants" as defined in Section 502(6), (12) and (14) of the Act, to the Camanche Reservoir and the Mokelumne River through them.

8. The Mokelumne River and Camanche Reservoir are "navigable waters of the United States," as defined in Section 502(7) of the Act, 33 U.S.C. 1362(7).

9. Since the initial issuance of this Order (December 17, 1993), EBMUD has applied for a National Pollutant Discharge Elimination System Permit ("NPDES") for the release of pollutants from MRDR to the Mokelumne River or Camanche Reservoir in response to court ruling. The State has not yet issued the permit.

10. On March 15, 1993, EPA issued an administrative order, Docket No. CWA-309-FY93-26, requiring EBMUD to undertake certain emergency response measures to reduce inflow into and mitigate the impacts of further releases from MRDR. This Findings of Violation and Order for Compliance supersedes that March 15, 1993 document and provides for a more comprehensive and permanent cleanup.

11. Based on the above, the Director repeats the finding that EBMUD is in violation of Section 301 of the Act.

## ORDER FOR COMPLIANCE

Based on the above Findings and the potential environmental and human health effects of the violations, and pursuant to the authority of sections 308 and 309 of the Act, 33 U.S.C. §§ 1318 and 1319, *IT IS HEREBY ORDERED THAT EBMUD* comply with the requirements in the following paragraphs. All EPA approved workplans and monitoring programs developed under this Order shall be incorporated into this Order and are enforceable as part of this Order.

12. Water Quality Objectives. EBMUD shall make no release which adversely affects the designated uses or exceeds applicable water quality standards of the Mokelumne River or Camanche Reservoir, as established pursuant to state law and/or Section 303 of the Act, 33 U.S.C. §1313. "Release", in the context of this Order means the addition of any pollutant to the Mokelumne River or Camanche Reservoir through (a) the spillway at Mine Run Dam, (b) the pipe located at the north end of Mine Run Dam, (c) seepage from Mine Run Dam, or (d) any point source operated by EBMUD at the Penn Mine site.

13. Diversion of Upstream Inflows.

Effective immediately upon issuance of this Order, EBMUD shall maintain, operate and monitor diversion structures such that storm water runoff that crosses waste

rock areas or flows into the Penn Mine Facility impoundments is minimized to the fullest extent practicable. If monitoring of diverted storm water at the discharge points into MRDR spill way or Camanche Reservoir indicates the presence of pollutants in concentrations that exceed water quality objectives as described in paragraph 12 of this Order, EPA may require modification of diversion structures or operation methods. Diversion of storm water around and away from waste rock material and the Penn Mine Facility impoundments during periods of wet weather runoff shall continue unless waste rock removal occurs and diversion is no longer necessary.

14. Treatment of Mine Run Dam Reservoir Waters

a. Effective immediately upon issuance of this Order, EBMUD shall continue to operate and maintain the In-Line System ("ILS") treatment unit and to conduct batch treatment of MRDR waters such that any releases from the ILS or MRDR meet the following criteria to the extent practicable:

pH – not less than 7 nor greater than 10 standard pH units.

TSS – shall not exceed average daily maximum of 30 mg/l (or, from the ILS, an average daily turbidity value of 3.8 Nephelometric Turbidity Units.

Metals –ILS effluent releases shall not exceed an average daily maximum of 2% of ILS influent concentration each for total cadmium, zinc, and copper. Metals limitations on ILS effluent do not apply if batch treatment of MRDR generates an

ILS influent pH not less than 7 nor greater than 10.

Treatment additives –EBMUD shall not use any chemical intended to enhance precipitation of suspended solids, with the exception of slaked lime or limestone, unless EPA approves such use.

Maintenance of the ILS for operational use when necessary to treat contaminated waters shall be continued until EPA approves discontinuing the system.

15. Sludge Disposal – MRDR and ILS Treatment Operations.

EBMUD shall remove and dispose of sludges generated from the batch, ILS treatment operations, or any subsequent treatment process, either on-site or at an off-site location, in accordance with the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6401 et seq. and any other applicable solid waste disposal requirements.

16. Notification of Overflows of MRDR.

EBMUD must notify EPA at least six hours prior to any overflow of the spillway of MRDR by telecommunications to Mr. Ken Greenberg at (415) 744-1905 or by facsimile at (415) 744-1873. EBMUD must submit written notification to EPA, confirming the overflow, within 72 hours of the overflow to:

Harry Seraydarian, Director

Water Management Division (W-1)

75 Hawthorne Street

San Francisco, CA 94105

If Mr. Ken Greenberg cannot be reached directly, a message shall be left on his Voice Mail and notification shall be made through EPA's 24-hour Emergency Response telephone number, (415) 744-2000.

17. Groundwater Investigation/Remediation

**Groundwater Investigation Workplan:** EBMUD shall submit a workplan to EPA, including a detailed schedule, for the investigation of groundwater quality, flow characteristics, and potential contamination risks to water supplies in Camanche Reservoir and the Mokelumne River due to subsurface transport of contamination from the Penn Mine Facility, including shafts three and four. Upon EPA approval, EBMUD shall implement the final plan in accordance with the approved schedule.

SUBMITTAL DUE: The draft Groundwater Investigation Workplan shall be due by March 1, 1994. A final Workplan which incorporates EPA's comments shall be due within thirty calendar days from receipt of EPA's comments.

**Groundwater Investigation and Cleanup Options Report:** EBMUD shall submit a report describing and documenting the results of the groundwater investigation. EBMUD shall include an evaluation of a range of potential groundwater remediation actions (including a "no action" option) and recommend a plan that meets the water quality objectives described in Paragraph 12 above.

SUBMITTAL DUE: A draft Groundwater Investigation and Remedial Options Report shall be due October

31, 1995. A final report which incorporates EPA's comments shall be due within thirty calendar days from receipt of EPA's comments.

**Groundwater Cleanup:** If EPA determines that groundwater cleanup is necessary to meet the water quality objectives described in Paragraph 12 above, EBMUD shall implement a groundwater cleanup program and monitor its effectiveness as directed by EPA. In this event, EBMUD shall submit a draft workplan and detailed schedule, allowing adequate time periods for public comment as necessary, for groundwater cleanup. As appropriate, this work shall be coordinated with the long term treatment program for mine drainage discussed in paragraph 20 below. (For example, if extraction of contaminated groundwater is implemented, it may be possible to treat both the mine drainage and the contaminated groundwater using the same system.)

SUBMITTALS DUE: A draft Groundwater Cleanup Workplan shall be due within 45 calendar days of EPA's determination that groundwater cleanup is necessary to meet the water quality objectives outlined in paragraph 12 above. The workplan shall include a schedule to implement the groundwater cleanup option selected by EPA. A final workplan incorporating EPA's comments shall be due within 30 days of receipt of EPA's comments. Upon EPA approval of a workplan, EBMUD shall implement the work in accordance with the approved schedule. Within six months of completing construction and operating the groundwater cleanup program, as applicable, EBMUD shall submit a report documenting the completion of construction and evaluating the effectiveness of the program.

18. Monitoring Requirements

**Monitoring Plan:** EBMUD shall submit for EPA's review and comment a proposal for a comprehensive monitoring program that includes routine monitoring and reporting of all diversion flows; Penn Mine facility impoundments including MRDR; ILS influent, effluent, and operational parameters; groundwater; and Camanche Reservoir. The monitoring program should substantially parallel the monitoring requirements in the March 15, 1993 *Finding of Violation and Order For Compliance* (CWA-309-FY93-26), as amended. The plan shall also include a program for toxicity testing of the ILS effluent. Monitoring must be conducted according to test procedures approved under 40 CFR Part 136. Quality assurance protocols for sample collection and analysis shall be included or referenced in the monitoring program.

Upon EPA's approval of the final monitoring plan, EBMUD shall be implement the plan. Until implementation of this plan, the monitoring requirements of the March 15, 1993 Finding of Violation and Order For Compliance (CWA-309-FY93-26), as amended, shall remain in effect. Any modifications to the final monitoring program must be approved by EPA in writing.

SUBMITTAL DUE: A draft monitoring plan was due and was submitted to EPA by February 15, 1994. A final monitoring plan incorporating EPA's comments was submitted within 30 calendar days of receipt of EPA's comments.

19. Long Term Pollution Control and Treatment

**Evaluation of Shorter Term Measures and Long Term Strategy Development:** Following completion of groundwater investigations, EBMUD shall submit a comprehensive site status and long-term alternatives evaluation report that includes the following information:

a. The hydrologic features and hydrologic dynamics of the Penn Mine watershed;

b. A status report on water quality in the watershed, Camanche Reservoir and the Mokelumne River;

c. A status report on acid mine drainage, contaminated groundwater and any additional potential for storm water runoff to become contaminated as it crosses the site;

d. An evaluation of a range of alternatives (including a "no action" alternative) that provide long-term protection in meeting the water quality objectives outlined in paragraph 12. This range of alternatives shall include at least one alternative for source control which employs waste rock removal, disposal, grading and revegetation of disturbed areas.

e. A recommended alternative that includes an acid mine drainage treatment system capable of meeting a 99 percent removal rate for total copper, total cadmium, and total zinc; effluent pH in the range of 7.0 to 10.0; and average daily maximum suspended solids effluent concentration of 30 mg/l or turbidity of 3.8 Nephelometric Turbidity Units.

SUBMITTAL DUE: A draft report detailing the information and evaluations described above shall be due

concurrent with the draft Groundwater Investigation and Remedial Options Report (Paragraph 17) and may be combined with that report. A final report incorporating EPA's comments shall be due within 30 calendar days of receipt of EPA's comments.

**Workplan for Implementing Long Term Measures:** EBMUD shall submit to EPA a workplan, including a detailed schedule that allows time periods for public comment where necessary, for implementing the EPA-selected long term measures for the site. This workplan shall include tasks for design and construction of any new facilities, development of operations and maintenance plans for any treatment system or other control structures, and development of a long-term site monitoring program that shall include chronic and acute toxicity testing of the treatment system effluent. Upon notice of EPA approval of the final workplan, EBMUD shall implement the workplan in accordance with the approved schedule.

SUBMITTAL DUE: The draft workplan for implementing long term strategies shall be due within 30 calendar days of EPA's selection of a long term plan. A final workplan, incorporating EPA's comments, shall be due within 30 calendar days of receipt of EPA's comments.

**Construction Completion Report – Long Term Measures:** EBMUD shall submit to EPA a report documenting the completion of construction of the acid mine drainage treatment system and any other control structures that have been selected by EPA as part of the long term strategy for meeting the water quality objectives defined in paragraph 12 of this Order. The report shall include a

preliminary evaluation of the effectiveness of the long term measures in meeting the objectives of the cleanup program. Additionally, the report shall describe long-term operations and maintenance plans for continuing to meet water the quality objectives defined in paragraph 12.

SUBMITTAL DUE: The construction completion report shall be due within six months of the completion of construction and operations start-up.

20. Reporting Requirements

**Progress Reporting:** EBMUD shall submit progress reports summarizing the status of compliance with the provisions of this Order on a monthly basis until all construction required under this Order is completed and routine operation is in place. At that time, EBMUD may petition EPA to modify the reporting frequency to quarterly. Any modifications to the reporting requirements must be approved in advance by EPA.

Progress reports shall include the following information:

a. A summary of work completed since submittal of the previous report, and work projected to be completed by the time of submittal of next report,

b. As relevant, appropriately scaled and labeled maps showing construction areas or monitoring points;

c. A summary of all monitoring and investigation data collected during the monitoring period and a discussion of its significance,

d. Identification of potential problems which will cause or threaten to cause noncompliance with this Order and what actions are being taken or planned to prevent these potential problems from resulting in non-compliance with the Order, and

e. In the event of noncompliance with the provisions of this Order, the report shall include written explanation of the events which led to the noncompliance and proposed actions and schedule to achieve compliance.

All reports submitted pursuant to this Order shall be signed by a principal executive officer, ranking elected official or duly authorized representative of EBMUD [as specified by 40 C.F.R. 122.22 (b) (2)] and shall include the following statement:

> I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, I certify that the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

21. Records. EBMUD shall maintain monitoring records, including:

a. The date, exact place, and time of sampling or measurements;

b. The individual(s) who performed the sampling or measurements;

c. The date(s) analyses were performed;

d. The individual(s) who performed the analyses;

e. The analytical techniques or methods used

f. The quality assurance protocols use in both the field and the analytical lab; and

g. The results of such analyses.

22. Submissions All submissions requested by this Order shall be mailed to:

U.S. Environmental Protection Agency
NPDES Permits Issuance Section (W-5-1)
Permits and Compliance Branch
Water Management Division
75 Hawthorne Street
San Francisco, CA 94105

All telephone inquiries should be made to Doug Liden at (415) 744-1920.

23. Reservation of Rights. EPA reserves the right to seek any and all remedies available under the Act for any violation cited in this Order. Issuance of this Finding and Order is not an election by EPA to forego any further administrative, civil, or criminal action to seek penalties, fines, or other appropriate relief under the Act. This order is not an NPDES Permit under Section 402 of the Act, 33 U.S.C. § 1342, nor does it relieve EBMUD of obligations imposed by the Act, or any Federal or State law.

The requirements of this Order do not supplant any requirements which are, or which in the future may be, established in connection with the suit captioned *Committee to Save the Mokelumne River v. East Bay Municipal Utility District*, No. CIV. S-91-1372 LKK (E.D. Cal.).

24. Effective Date. This Order is effective upon signature.

25. Modification and Termination.

a. The California State Water Resources Control Board ("State Board") and the Regional Water Quality Control Board, Central Valley Region ("Regional Board"), have stated their intent to issue a National Pollutant Discharge Elimination System ("NPDES") permit for the In-Line System installed by EBMUD to treat and discharge the contents of MRDR to Camanche Reservoir. In addition, the State Board and Regional Board have stated their intent to develop and issue a general permit to control the discharge of pollutants due to storm water runoff from inactive and abandoned mines throughout the State of California. The State Board and Regional Board are also considering additional mechanisms by which storm water runoff and other pollutant sources from inactive and abandoned mines may be regulated. Following adoption of such measures for Penn Mine, the requirements below may be modified as appropriate and in accordance with the terms of this Order.

b. To the extent that the State Board issues an effective permit or alternative regulatory mechanism which contains requirements that EPA determines are equivalent to any of the requirements of this Order, EPA may modify or terminate those portions of this Order

which are equivalent to the requirements of an effective permit or alternative regulatory mechanism. Any portions of this Order which are not found by EPA to be equivalent to the requirements contained in an effective permit or alternative regulatory mechanism shall remain in effect through this Order.

c. In the event that one or more permits or alternative regulatory mechanism do not supersede the requirements of this Order, this Order shall terminate when EPA determines that EBMUD has satisfactorily completed all of the requirements set forth in this Order.

26. Compliance with Applicable Laws

All activities undertaken by EBMUD pursuant to this Order shall be performed in accordance with the requirements of all federal, state, and local laws and regulations.

Dated this 16th day of June, 1994.

/s/ Alexis Strauss
for- Harry Seraydarian
Director
Water Management Division
U.S. Environmental
Protection Agency,
Region IX
75 Hawthorne Street
San Francisco, CA 94706